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In the
SUPREME COURT OF THE UNITED STATES

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL.,
PETITIONERS,
v.
DORIS SIMMONS-HARRIS, ET AL.,
RESPONDENTS

On Writ of Certiorari to the
United States Court of Appeals
For The Sixth Circuit

BRIEF OF THE STATES OF FLORIDA, ALABAMA, DELAWARE, NEBRASKA, PENNSYLVANIA, SOUTH CAROLINA AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

The *amici* are States that take seriously their constitutional responsibilities to educate children. Various crises have created the need, and a demand, for substantial improvements in the quality of state-supplied education, and one effective solution being implemented or considered by some *amici* is the alternative school choice program. These programs provide the parents of public school students the opportunity to send their children to alternative schools, including, at the option of individual parents, religious schools.

The Sixth Circuit's decision in *Simmons-Harris v. Zelman*, 234 F.2d 945 (6th Cir. 2000), threatens to undermine the constitutional legitimacy of these initiatives and embroil States' public school systems in extensive litigation regarding these programs. That decision should be reversed.

Through this brief, the *amici* will attempt to offer the Court their unique perspective on alternative school choice programs, explaining why state legislatures have deemed them important tools to improve the quality of public school education and the educations of current public school students. The *amici* will also discuss the factors the Sixth Circuit relied upon in declaring the Ohio program unconstitutional and show that those factors do not support the circuit court's decision.

Ultimately, the *amici* urge the Court to reverse the Sixth Circuit's decision and confirm that these initiatives satisfy the requirements of the Establishment Clause. The *amici* also ask that, at a minimum, the Court provide much needed guidance regarding how alternative school choice programs may be constitutionally implemented to achieve their goal of correcting problems in public schools while educating public school children.

SUMMARY OF ARGUMENT

Consistent with the well-recognized notion that an educated populace is essential to the Nation's success, States have undertaken to educate children through public schools. Where problems in those schools undermine their educational purpose, and the common solution of simply increasing public school spending has proven ineffective, States have sought a solution in alternative school choice programs.

Alternative school choice programs can take on many forms and address any of numerous potential problems. For instance, Florida grades each public school and permits students who attend certain "failing" schools the opportunity to attend higher performing public schools or participating private schools, whether sectarian or nonsectarian. Florida's program thus focuses on individual "failing" schools. Ohio's program focuses on school districts placed under state supervision by federal courts.

Regardless of their form, the purpose and intended effect of these programs are to correct public schools' deficiencies. This is done by encouraging public schools to improve and, concomitantly, offering alternative educational opportunities to the students who are being disserved by their generally assigned public schools. Recent studies have shown these programs to be successful.

Accordingly, the Sixth Circuit erred in analogizing the Ohio alternative school choice program to the New York school aid program at issue in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). The New York program provided tuition to students in both sectarian and nonsectarian private schools in order to keep students enrolled in those schools, while alternative school choice programs seek to improve public schools and, in the meantime, to give parents the option of sending their children to public or private schools.

Rather than *Nyquist*, the Sixth Circuit should have relied on this Court's well-established case law holding that

government funds may constitutionally be used to enroll in sectarian institutions where private individuals chose to direct those funds through otherwise religiously neutral government programs. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (upholding a federal program that supplied an interpreter for a deaf child attending a sectarian school); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding a state vocational rehabilitation program that funded a disabled student's religious education at a private Christian college); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a state law permitting parents tax deductions for certain expenses incurred in sending children to sectarian schools). These cases confirm that the basic structure of alternative school choice programs is constitutionally sound.

The Sixth Circuit distinguished *Mueller* and its progeny from the instant case by holding that the Ohio program fails to give students a meaningful choice of alternative schools and thus promotes religion by coercing students to enroll in sectarian schools. The court offered two bases for that conclusion: the Ohio program's $2500 limitation on tuition that private schools may charge participating students, and the court's observations that 82 percent of the participating schools were sectarian and approximately 96 percent of participating students attended sectarian schools. Neither of these bases supported the court's conclusion.

First, the tuition limitation fails to show that the Ohio program promotes religion. The Sixth Circuit assumed that any tuition limitation favors sectarian schools because sectarian schools supposedly have lower tuition rates. Nothing in the record supports that generalization, and, more importantly, even if that generalization were appropriate in the case of Cleveland's private schools, the Sixth Circuit made no finding whatsoever that the Ohio legislature adopted that provision arbitrarily or intentionally to discourage participation in the program by nonsectarian schools. Nothing short of such proof should suffice before a court may declare that a tuition limitation, implemented

in the course of an otherwise religiously neutral, private choice-based alternative school choice program, has the purpose or primary effect of promoting religion. States require latitude to examine the particular conditions of their public and private school markets and to set such limitations in accordance with those conditions.

Further, the Sixth Circuit misplaced its reliance on statistical evidence showing how many of the schools participating in the Ohio program were sectarian and how many of the participating students chose to attend sectarian schools. States have no control whatsoever regarding the makeup of the private school market, which, as the information detailed *infra* demonstrates, varies considerably between and within States. Nor do States have any control over the decisions regarding participation made by private schools or individual parents. The constitutionality of an otherwise religiously neutral alternative school choice program should not turn on the result of such private decision-making, and, standing alone, statistical evidence regarding what schools chose to participate in the program and what choices parents and students make should not be constitutionally relevant.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT STATES FROM IMPROVING AILING SCHOOL SYSTEMS THROUGH RELIGIOUSLY NEUTRAL, ALTERNATIVE SCHOOL CHOICE PROGRAMS.

This Court has recognized that "[a]n educated populace is essential to the political and economic health of any community . . . ." *Mueller v. Allen*, 463 U.S. 388, 395 (1983). Not surprisingly, then, each State is obliged by its constitution to educate children.[1]

Where a State's educational mission is hindered by problems in its public school system, that State holds a responsibility to its citizens, and to its students in particular, to identify and correct those problems. The Ohio alternative school

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[1] *See* Ala. Const. Art 14, § 256, Alaska. Const. Art 17, § 1, Ariz. Const. Art 11, § 8, Ark. Const. Art 14, § 1, Cal. Const. Art 9, § 1, Colo. Const. Art 9, § 2, Conn. Const. Art 8, § 1, Del. Const. Art 10, § 1, Fla. Const. Art 9, § 1, Ga. Const. Art 8, § 1, Haw. Const. Art 11, § 1, Idaho Const. Art 9, § 4, Ill. Const. Art 10, § 1, Ind. Const. Art 8, § 1, Iowa Const. Art 9, § 1, Kan. Const. Art 6, § 1, Ky. Const. Art 6, § 1, La. Const. Art 8, § 1, Me. Const. Art 8, § 1, Md. Const. Art 8, § 1, Mass. Const. Pt. 2,C5, § 2, Mich. Const. Art 8, § 1, Minn. Const. Art 13, § 1, Miss. Const. Art 8, § 201, Mo. Const. Art 9, §1a, Mont. Const. Art 10, § 1, Neb. Const. Art 7, § 1, Nev. Const. Art 11, § 1, N.H. Const. Pt.2, Art 83, N.J. Const. Art 8, § 4, N.M. Const. Art 12, § 1, N.Y. Const. Art 11, § 1, N.C. Const. Art 9, § 1, N.D. Const. Art 8, § 1, Ohio Const. Art 6, § 2, Okla. Const. Art 13, § 1, Or. Const. Art 8, § 2, Pa. Const. Art 3, § 14, R.I. Const. Art 1, § 12, S.C. Const. Art 11, § 3, S.D. Const. Art 8, § 1, Tenn. Const. Art 11, § 12, Tex. Const. Art 1, § 1, Utah Const. Art 10, § 1, Vt. Const. Ch.11, § 1, Va. Const. Art 8, § 1, Wash. Const. Art 9, § 1, W. Va. Const. Art 12, § 2, Wis. Const. Art 10, § 1, Wyo. Const. Art 1, § 23.

choice program represents Ohio's attempt to fulfill that responsibility.

The Sixth Circuit's decision below misinterpreted the purpose and primary effect of Ohio's alternative school choice program and misapplied the Establishment Clause, relying upon suppositions and considerations that have no place in Establishment Clause analysis. States must devise effective responses to crises facing their public schools, and, contrary to the Sixth Circuit's decision, the Constitution does not prohibit States from adopting religiously neutral alternative school choice programs.

A. THE PURPOSE AND INTENDED EFFECT OF ALTERNATIVE SCHOOL CHOICE PROGRAMS ARE TO CORRECT PROBLEMS IN PUBLIC SCHOOLS.

Alternative school choice programs represent a response by States to critical and substantial problems facing the quality of public school systems and the education they provide. Such problems have long resisted correction by a mere influx of additional public monies, and they directly impede, if not undermine, States' education efforts and responsibilities.

In Florida, for instance, each public school is graded annually along the traditional "A" through "F" range, and students who attend public schools receiving a failing grade – "F" – twice in a four-year period are offered the opportunity to attend higher performing public schools or qualified private schools. Fla. Stat. § 229.0537 (2001). Florida therefore directs its alternative school choice program at individual failing public schools. By comparison, the Ohio Program now under review provides alternative school choice options to students enrolled in any school district that, by federal court order, has been placed under the supervision and management of Ohio's Superintendent of Public Instruction. Thus, Ohio directs its alternative school choice program at students attending schools in districts where a

federal court has found local control to be sufficiently ineffective to warrant state supervision.

Alternative school choice programs may be used to address a myriad of problems, including poor test scores, poor graduation rates, overcrowding, and poor services for students with disabilities. However, regardless of the situation addressed by a particular program, alternative school choice programs focus squarely on correcting an identified deficiency in the public school system and, at the same time, supplying alternative educational opportunities to the students who are being disserved by that system.

By design, the latter goal supports the former. A student's selection of an alternative school results in a reallocation, partial or whole, of public monies that would ordinarily be used to finance that student's education in the public school he or she would otherwise attend. That reallocation, and even its mere threat, encourages local public school systems to correct whatever deficiencies triggered or may trigger implementation of an alternative school choice program.

Other incentives may operate as well. For example, Florida's system of grading individual schools is meant to create an objective, easily understood spectrum along which a school's performance may be judged by educators, administrators, and the public alike. No school finds a source of pride in being labeled an "F" school or, for that matter, a "D" school. The incentive of competition for grades among public schools, and the considerable stigma attached to low or failing grades, may spur poor schools to improve their quality and thus their grades.

From the States' perspective, the critical point regarding alternative school choice programs is that they succeed. For example, following the Florida legislature's 1999 adoption of Governor Jeb Bush's A+ Plan for Education, which includes Florida's Opportunity Scholarship Program, two reports, the most recent of which was commissioned by Florida's Department of Education, confirmed that Florida's alternative school choice

program had, in fact, begun to improve the performance of the state's public schools. Jay P. Greene, An Evaluation of the Florida A-Plus Accountability and School Choice Program (Feb. 2001); Carol Innerst, Competing to Win: How Florida's A+ Plan Has Triggered Public School Reform (Apr. 2000).[2] Such reports and studies provide strong support for the potential of alternative school choice programs to foster substantial and sorely needed improvements in our Nation's public schools.

The *amici* believe that alternative school choice programs represent an important tool by which state legislatures may meet citizens' demands to improve poorly performing public school systems. Neither the advancement of religion nor its inhibition has any place in the motivation behind such programs, as their focus lies squarely on the States' public schools and the students they serve.

In this respect, the Sixth Circuit's reliance on *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), was wholly misplaced. There, this Court rejected a New York program designed to aid financially ailing private schools by, among other things, granting all private school students a fixed amount of money to use towards tuition. The clear purpose and intended effect of that program were to provide financial aid not only to New York's nonsectarian private schools but to its sectarian private schools – in order to keep all of those schools in operation.

Alternative school choice programs, by comparison, do not reflect any legislative effort to perpetuate the existence of fiscally unsound sectarian or nonsectarian schools. Alternative school choice programs seek to correct deficiencies in public schools. Accordingly, the Sixth Circuit erred in failing to

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[2] A copy of the Greene report may be found on the Internet at http://www.ksg.harvard.edu/pepg/pdf/Florida%20A+.pdf. A copy of the Innerst report may be found at http://www.edreform.com/school_choice/compete.htm.

recognize the critical distinction between alternative school choice programs and programs that specifically seek out and support ailing religious institutions, such as the New York program at issue in *Nyquist*. That case should simply be inapposite here.

B. THE ESTABLISHMENT CLAUSE PERMITS PARENTS TO DIRECT EDUCATIONAL AID TO SECTARIAN OR NONSECTARIAN SCHOOLS THROUGH RELIGIOUSLY NEUTRAL EDUCATION PROGRAMS.

Rather than *Nyquist*, the Sixth Circuit should have focused its attention on a well-established line of Supreme Court cases holding that the use of public funds to finance religious educations does not contravene the Establishment Clause where that use results from the private choices of individuals in the context of a religiously neutral government program. For example, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court approved, on Establishment Clause grounds, a Minnesota tax law that permitted parents to deduct their children's education expenses, including religious school tuition, textbooks and transportation. The Court held that no "imprimatur of State approval" exists where public funds reach sectarian schools only as a result of individual parents' decisions regarding where to educate their children. *Id.* at 399 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)).

The Court subsequently held that a state vocational rehabilitation program would not violate the Establish Clause by providing financial assistance to a disabled student who chose to use his aid monies to attend a private Christian college and study to be a religious pastor, missionary, or youth director. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986). The Court observed that the program could aid religious institutions "only as a result of the genuinely independent and

private choices of aid recipients." *Id.* at 488.

Similarly, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court held that the Establishment Clause did not prohibit federal funds from being used to provide an interpreter in school for a deaf student where the student chose to attend a Catholic high school. The Court explained that where government offers a neutral service as part of a program that "is in no way skewed towards religion," then the provision of that service does not violate the Establishment Clause.

As with the aid programs at issue in these cases, no principled reason suggests that alternative school choice programs cannot survive Establishment Clause scrutiny. To the contrary, *Mueller*, *Witters*, and *Zobrest* demonstrate that the choice format utilized by alternative school choice programs satisfies the constitutional proscription against state-sponsored religious indoctrination. Parents may chose to send their children to their generally assigned public schools, or parents may opt to send their children to one of whichever public or private schools participate in the alternative school choice program. The existence of sectarian or nonsectarian schools in the particular private school market impacted by the alternative school choice program, the participation of those schools in the program, and students' enrollment in those schools are the results of private actors' decisions, unattributable to any State. Under these circumstances, constitutionally sufficient neutrality and private choice separate the State from any religious institution that ultimately receives public aid.

It bears emphasis at this point that the breadth of options available to parents can vary from program to program. For instance, while Ohio permits public schools in neighboring districts to elect whether to participate in the alternative school choice program, Florida directs that parents of children in failing schools may send their children not only to qualified private schools that opt to participate in the program but to public schools in the same district that received at least a "C" grade or, space permitting, an adjacent district's public schools that graded

higher than the students' assigned schools. Fla. Stat. § 229.0537(3).

Thus, as in Florida, the public school alternatives available to parents may extend to include schools other than a student's generally assigned public school. In Ohio, by comparison, where these programs are run on a district-wide basis, students may attend public schools in other districts only where those schools elect to participate in the program. The characteristics of different States' programs should be expected to reflect the unique dynamics of the States' education systems, including the many different balances struck between state and local control of public education.

In sum, while individual State legislatures may tailor alternative school choice programs to meet their States' particular needs, the general format of alternative school choice programs is based on well established principles of neutrality and private choice. Consequently, the basic nature of such programs is wholly consistent with, and does not contravene, the Establishment Clause.

II. THE USE OF RELIGIOUSLY NEUTRAL CRITERIA TO IDENTIFY ALTERNATIVE SCHOOLS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE UNLESS THE CRITERIA ARBITRARILY OR INTENTIONALLY DISCOURAGE NONSECTARIAN SCHOOLS' PARTICIPATION IN THE PROGRAMS.

In examining Ohio's alternative school program, the Sixth Circuit held that, despite the program's facial neutrality with regard to sectarian schools, the program is not, in fact, religiously neutral because it discourages participation by schools not funded by religious institutions. Therefore, the Sixth Circuit found, the Ohio program has the impermissible effect of promoting sectarian schools.

This Court should reject the circuit court's supposedly "as applied" examination, which was based on supposition and constitutionally irrelevant observations, and reverse the decision below. The Court should confirm that, where neutral criteria are used to define a pool of eligible alternative schools, the Establishment Clause is not violated absent a showing that the program arbitrarily or intentionally discourages participation by nonsectarian schools. The Court should also confirm that, standing alone, the percentage of sectarian schools participating in an otherwise religiously neutral program, and the percentage of participating children who chose to attend sectarian schools, are not relevant to the constitutional analysis.

A. OHIO'S TUITION LIMITATION DOES NOT ADVANCE RELIGION BECAUSE IT HAS NOT BEEN SHOWN TO BE ARBITRARY OR INTENTIONALLY DISCOURAGE NONSECTARIAN SCHOOLS' PARTICIPATION IN THE PROGRAM.

The first basis offered by the Sixth Circuit to support its conclusion that nonsectarian schools are discouraged from participating in Ohio's alternative school choice program is the Ohio legislature's decision to place a $2500 limit on the tuition that private schools may charge participating students, of which the program's scholarship will fund either 90 or 75 percent, depending on various circumstances. The court concluded that this limitation served to discourage participation from schools not funded by religious organizations because "religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." 234 F.3d at 959. As Judge Ryan pointed out in his partial dissent, the court's conclusion was entirely unsupported.

Simply put, nothing in the record shows that the tuition limitation has arbitrarily discouraged participation by any

nonsectarian school or that the Ohio legislature selected the $2500 figure with the intent of discouraging nonsectarian schools from participating in the alternative school choice program. In fact, nothing in the record before this Court shows that the tuition limitation has discouraged nonsectarian schools at all from participating in the Ohio program.

Common sense likewise offers no support for the Sixth Circuit's supposition. Even assuming *arguendo* that all or most sectarian schools are subsidized – an unsupported assumption – no basis exists to presume that nonsectarian schools are not also subsidized, whether through endowments or private grant programs. Perhaps more importantly, there is no basis to presume that the Ohio legislature did not take all of these considerations into account when setting the tuition limitation for participating private schools.

In point of fact, levels of public school funding and private school tuition, as well as whether sectarian schools in a given area are more or less subsidized than their nonsectarian counterparts, are local issues that deserve localized attention by individual State legislatures. In crafting alternative school choice programs, States should not be constitutionally prohibited from examining their particular circumstances and, where deemed appropriate, setting tuition limitations that are less than or equal to the amount that would otherwise be spent on children's public education, so long as such limitations do not arbitrarily or intentionally discourage participation by nonsectarian schools.

This Court should not presume that, in setting a tuition level, a State legislature acted with an unconstitutional motive. Nor should this Court simply presume that a tuition limitation arbitrarily discourages nonsectarian schools from an otherwise religiously neutral alternative school choice program. Rather, the Court should require that, to declare an alternative school choice program infirm under the Establishment Clause due to a tuition limitation, a court must find that the limitation arbitrarily or intentionally discourages participation by nonsectarian schools. Absent such proof, no basis exists for a reasonable person to

believe that the State has set out to sponsor the religious indoctrination of students, and the program cannot be said to have either the purpose or primary effect of promoting religion.

The respondents made no showing whatsoever either that the Ohio program's tuition limitation arbitrarily discourages nonsectarian schools' participation or that the Ohio legislature adopted the limitation to discourage their participation. Nor did the district court or the circuit court make any such findings. Accordingly, this Court should reject the Sixth Circuit's erroneous and unfounded conclusion that the Ohio program's tuition limitation unconstitutionally advances religion.

B. NEITHER THE PERCENTAGE OF PARTICIPATING SECTARIAN SCHOOLS NOR THE PERCENTAGE OF STUDENTS SELECTING SECTARIAN SCHOOLS SHOULD BE CONSTITUTIONALLY RELEVANT.

The second basis offered by the Sixth Circuit for its conclusion that the Ohio alternative school choice program discouraged participation from nonsectarian schools was the high percentage of participating schools that were sectarian – specifically, 82 percent – and the high percentage of students utilizing the program who elected to enroll in sectarian schools – approximately 96 percent. Both of these factors are beyond the control of Ohio, and neither should be constitutionally relevant, let alone determinative, in Establishment Clause analysis.

According to data from a recent United States Department of Education study released in August 2001, 78.4 percent of the country's 27,223 private elementary and secondary schools are sectarian. The study also indicates that the distribution of nonsectarian to sectarian schools is not consistent. Rather, it varies across the nation, as shown by the following table:

State	Total	Nonsectarian	Sectarian	Percentage Nonsectarian
AL	347	98	249	28.24%
AK	67	19	48	28.36%
AZ	335	123	212	36.72%
AR	184	27	157	14.67%
CA	3,832	1,605	2,227	41.88%
CO	418	172	246	41.15%
CT	387	165	222	42.64%
DE	120	43	77	35.83%
DC	83	42	41	50.60%
FL	1,460	436	1,024	29.86%
GA	527	147	380	27.89%
HI	128	30	98	23.44%
ID	110	30	80	27.27%
IL	1,536	449	1,087	29.23%
IN	720	122	598	16.94%
IA	250	10	240	4.00%
KS	213	18	195	8.45%
KY	411	82	329	19.95%
LA	417	78	339	18.71%
ME	137	69	68	50.37%
MD	788	288	500	36.55%
MA	861	471	390	54.70%
MI	997	136	861	13.64%
MN	547	90	457	16.45%
MS	186	54	132	29.03%
MO	572	100	472	17.48%
MT	92	22	70	23.91%

State	Total	Nonsectarian	Sectarian	Percentage Nonsectarian
NE	232	20	212	8.62%
NV	104	38	66	36.54%
NH	372	265	107	71.24%
NJ	1,006	341	665	33.90%
NM	208	87	121	41.83%
NY	2,010	493	1,517	24.53%
NC	509	129	380	25.34%
ND	54	7	47	12.96%
OH	1,051	200	851	19.03%
OK	168	28	140	16.67%
OR	376	132	244	35.11%
PA	2,238	592	1,646	26.45%
RI	168	94	74	55.95%
SC	387	97	290	25.06%
SD	77	10	67	12.99%
TN	479	128	351	26.72%
TX	1,318	296	1,022	22.46%
UT	100	59	41	59.00%
VT	122	80	42	65.57%
VA	606	232	374	38.28%
WA	482	149	333	30.91%
WV	130	18	112	13.85%
WI	975	112	863	11.49%
WY	41	9	32	21.95%

Source: *Private School Universe Survey: 1999-2000*, U.S. Department of Education, Office of Educational Research and Improvement, National Center for Educational Statistics, Doc. No. NCES 2001-330 (Aug. 2001), *available at* http://nces.ed.gov/surveys/pss/ *and searchable through* "Private School Locator" *at* http://nces.ed.gov/surveys/pss/locator/locator.asp.

Thus, while over 90 percent of private schools in Iowa, Kansas, and Nebraska are sectarian, that figure drops to less than 50 percent in Maine, Massachusetts, New Hampshire, Rhode Island, Utah and Vermont. The lowest percentage of sectarian schools is found in New Hampshire, where only 28.76 percent of the private schools are sectarian.

Similar variations can be seen on a local level. For example, Florida's most recent data show that while 66.58 percent of Florida's private schools are sectarian, the percentages of sectarian to nonsectarian private schools within Florida's 67 school districts, each of which is countywide, vary from zero to 100 percent.

These observations compel two conclusions. First, the fact that 82 percent of the schools participating in the Ohio program were sectarian did not show, as the Sixth Circuit concluded, that the program discouraged participation by nonsectarian schools. To the contrary, the Ohio program appears to have captured a remarkably fair cross-section of the state's private schools, as the U.S. Department of Education survey shows that 80.97 percent of Ohio's private schools are sectarian.

Second, none of these figures, standing alone, should hold constitutional significance in the context of alternative school choice programs. Decisions regarding whether to open and maintain a private school, sectarian or otherwise, are made by private actors based on a plethora of factors, all of which are beyond any State's control. The net result of such private, independent decisions should not, as a matter of constitutional law, preclude States from employing an alternative school choice program in one locale while permitting States to employ the identical program in another. Otherwise, a program could be constitutional in New Hampshire, because of its largely nonsectarian private school market, but unconstitutional in Ohio, where the percentage of sectarian schools is more than twice as high. The Establishment Clause should not be so fickle.

Nor should a particular program's constitutionality turn

on the extent to which private schools elect to participate in an alternative school choice program or the extent to which parents who choose to participate select sectarian or nonsectarian schools for their children. This Court has previously refused to consider such factors in evaluating a program's legitimacy under the Establishment Clause. *See Agostini v. Felton*, 521 U.S. 203, 229 (1997) ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); *Mueller v. Allen*, 463 U.S. 388, 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

These decisions, like those that produce the private school market in a given area, are inherently private and unrelated to any State actor. Whatever their results, which can be expected to change from time to time in any given State or locale, any religious indoctrination stemming from voluntary enrollment in a sectarian private school through an alternative school choice program cannot reasonably be attributed to governmental action. Accordingly, the Sixth Circuit erred when it used the percentage of sectarian schools in the Ohio program and the percentage of participating students enrolled in such schools to conclude that the Ohio program impermissibly advances religion.

CONCLUSION

Alternative school choice programs are a religiously neutral means of improving deficiencies in States' public school systems. To the best of their abilities, States have attempted to craft these programs not to produce governmental indoctrination of religion but rather to permit private and independent choices by parents to determine where their children receive their education. The States' goal is, ultimately, to educate children, and to do so while neither advancing nor inhibiting religion.

The *amici* respectfully request this Court to reverse the Sixth Circuit's decision and to confirm the constitutional validity of these programs. In all events, the *amici* request this Court to provide much needed guidance on how alternative school choice programs may be crafted in a manner that comports with the Constitution and permits States to achieve their goal of educating children.

Respectfully submitted,

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